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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE  
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

SEP 10 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

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|-----------------------|---|----------------------------|
| THE STATE OF ARIZONA, | ) |                            |
|                       | ) |                            |
| Respondent,           | ) | 2 CA-CR 2008-0042-PR       |
|                       | ) | DEPARTMENT A               |
| v.                    | ) | <u>MEMORANDUM DECISION</u> |
|                       | ) | Not for Publication        |
| TERRY MICHAEL MILLER, | ) | Rule 111, Rules of         |
|                       | ) | the Supreme Court          |
| Petitioner.           | ) |                            |
|                       | ) |                            |

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20030579

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Presiding Judge.

¶1 Petitioner Terry Miller was convicted of first-degree murder after a jury trial and sentenced to life in prison with the possibility of parole after twenty-five years. He appealed the conviction, and this court affirmed. *State v. Miller*, No. 2 CA-CR 2004-0137 (memorandum decision filed Nov. 14, 2005). In this petition for review, Miller contends the trial court abused its discretion by rejecting his claim raised in a petition for post-conviction relief, *see* Rule 32, Ariz. R. Crim. P., that his due process rights were violated by the state's pursuit of inconsistent theories of culpability as to Miller and another individual who also had been involved in the murder but against whom charges had been dismissed. Additionally, Miller contends he was entitled to relief on his claim that trial counsel was ineffective in failing to move in limine to preclude the introduction of prior-act evidence. We will not disturb the trial court's order denying post-conviction relief absent a clear abuse of discretion. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶2 The evidence, viewed in the light most favorable to affirming the conviction, *see State v. Mills*, 196 Ariz. 269, ¶ 2, 995 P.2d 705, 707 (App. 1999), is set forth in this court's memorandum decision on appeal. Briefly, the evidence established that Miller, Justin Howard, Corey Greenwell, and the victim had driven to an area to smoke methamphetamine. At one point, Greenwell returned alone to the car. While there, he heard two shots; Miller and Howard then came running back to the car without the victim. Miller said that Howard had "pulled the second shot." Miller made a variety of inconsistent statements thereafter about what had occurred. The victim's body was found the next morning.

¶3 In his petition for post-conviction relief, Miller contended he had been denied due process because the state had asserted inconsistent theories against him and Howard. After he had been convicted and sentenced, Howard was charged with the same murder. After the trial court in Howard’s case apparently declared a mistrial, Howard moved to dismiss the charge on the ground that, having prosecuted Miller on the theory that he had been the shooter, the state could not then prosecute Howard on the inconsistent theory that Howard had shot the victim. That trial court granted the motion, relying in part on *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997),<sup>1</sup> and finding that “the theory that the State used in [the] *State v. Miller* matter and, the prosecution theory that the State used in this matter are fundamentally inconsistent.” It added that Howard’s due process rights had been “fundamentally violated.” Miller also asserted in his petition for post-conviction relief that trial counsel was ineffective because he had failed to object when the state introduced evidence related to the following: (1) that Miller had been looking for individuals who allegedly had assaulted his friend, Dan Gutierrez, who was also one of the state’s witnesses, and (2) that Miller was controlling and possessive of his girlfriend.

¶4 Denying relief on these claims, the trial court found that it was not bound by the ruling in Howard’s case. The court also rejected on its merits the claim that the state impermissibly had pursued inconsistent theories of culpability. The court noted the evidence

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<sup>1</sup>The United States Supreme Court subsequently reversed *Calderon* on other grounds. *Calderon v. Thompson*, 523 U.S. 538 (1998).

at Miller's trial showed Miller had been armed with a .357 revolver and Howard had a .22 rifle. The court added:

[T]he State introduced evidence that Miller made inconsistent statements after the homicide to various witnesses that suggested both he and Howard shot the victim, that he was responsible for killing her, and that he assisted Howard in killing her but was not the triggerman. The State also introduced statements that the murder occurred as a result of Miller and Howard trying to rob the victim. Finally, the State presented evidence that established that Petitioner fired at least one of the shots heard by Greenwell, while the other shot was the result of a gun being fired by Howard. It was the defense that put forward the theory and called a witness to suggest that both shots were fired by Howard. Based upon the State's theory, evidence and arguments, the prosecution was entitled to argue at the trials of both Petitioner and Howard that both guns were fired and that whether Petitioner was the primary shooter or just an accomplice, he was guilty of murder in the first degree. The alleged crimes and the facts presented by the State was [sic] never that only one man could have committed this murder. While "a prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants charged with the same murder can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith," the prosecutor's conduct does not rise to this level when two defendants are convicted of a crime that, by its nature, could be committed by two people. *Nguyen v. Lindsey*, 232 F.3d 1236, 1240 (9th Cir. 2000).

¶5 On review, Miller essentially reiterates the claim he raised below, but he also contends the trial court erred when it concluded it was not bound by the Howard decision. He argues the state was precluded by the doctrine of collateral estoppel from challenging in this proceeding the issue that had already been litigated by the state in Howard's case.

¶6 Not only was the theory of collateral estoppel asserted for the first time in the petition for review, but it is contrary to the position Miller took below. Specifically, Miller stated in his reply to the state’s response to his petition for post-conviction relief, “[A]nother division already has found the State used fundamentally inconsistent theories to convict Defendant and attempt to convict Justin Howard. Although that finding is not binding upon this Court, it certainly is very persuasive authority that the State used inconsistent theories.” Consequently, we will not address the question whether the trial judge was bound by the Howard order. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (refusing to address issue raised in petition for review that had not “been presented to the trial court for its consideration”).

¶7 Nor has Miller sustained his burden of establishing the trial court abused its discretion when it denied relief after finding the state had not impermissibly pursued inconsistent theories of culpability for the victim’s murder. The state’s theory of Miller’s culpability was not so inconsistent with the theory it subsequently presented as to Howard that “fundamental and egregious error” occurred, violating Miller’s due process rights. *Drake v. Kemp*, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring). At the heart of the prohibition against inconsistent theories is the notion that prosecutors have a duty to present evidence that is accurate and truthful and to facilitate rather than inhibit the truth-seeking process. *See Nguyen*, 232 F.3d at 1240. Thus, as the court noted in denying Miller’s petition for post-conviction relief, a prosecutor is guilty of misconduct if the prosecutor presents testimony he or she knows is false, manipulates the evidence in a disingenuous

manner, or fails to correct the record with respect to admitted evidence the prosecutor learns is inaccurate. *See id.* at 1240; *State v. Moody*, 208 Ariz. 424, ¶ 28, 94 P.3d 1119, 1134 (2004); *see also Giles v. Maryland*, 386 U.S. 66, 74 (1967). Consequently, the state violates a defendant's due process rights when inconsistencies in the prosecutions of multiple defendants "exist at the core of the prosecutor's case against defendants for the same crime." *Smith v. Goose*, 205 F.3d 1045, 1052 (8th Cir. 2000).

¶8           Apparently, the state called Charlie Ward to testify at Howard's trial that Howard was the shooter after Ward had testified for the defense at Miller's trial, and the prosecutor had aggressively tried to impeach him. Nevertheless, ultimately the state's theories in these cases were "not necessarily inconsistent." *Moody*, 208 Ariz. 424, ¶ 28, 94 P.3d at 1134. The trial court correctly noted in its order denying post-conviction relief that the state had asserted at Miller's trial that either Miller or Howard may have been the shooter. We pointed this out as well in our memorandum decision on appeal when we addressed whether the court had erred by giving the jury an accomplice instruction. *Miller*, No. 2 CA-CR 2004-0137, ¶¶ 14-18. Reviewing the evidence that supported the instruction and finding no error, we stated: "Although there was no eyewitness testimony about the shooting, the evidence showed Miller was either the shooter, the planner, or an assistant in [the victim]'s murder." *Id.* ¶ 15.

¶9           Additionally, the prosecutor told the jury it could find Miller guilty based on an accomplice theory of liability, explaining the instruction and the fact that a person can be guilty of first-degree murder if the person acted as an accomplice. The prosecutor argued

that, even if the jury believed “everything” Ward had said, Miller was still guilty of first-degree murder. The prosecutor reviewed Ward’s testimony about how Miller had wanted to shoot the victim but had begun to cry and could not do it, so Howard had taken the gun and fired. The prosecutor explained Miller was culpable as Howard’s accomplice even if Howard had “actually pulled the trigger.” The prosecutor also told the jury it would be instructed that it was not a defense “that one or more other persons not now on trial might also have participated or cooperated in the crime.” The prosecutor explained, too, that the jury was not there to determine Howard’s culpability because “[t]hat is not for this time or place.”

¶10 The prosecutor explained this theory further during rebuttal closing argument after defense counsel had suggested in closing that the jury had to find Miller had been the shooter in order to find him guilty of first-degree murder. The prosecutor stated:

[T]hat’s just an absolute misstatement of the law. That’s why I went over in detail the accomplice liability. You do not . . . have to be convinced beyond a reasonable doubt that this man actually stood there and pulled the trigger, shot her in the back, waited until she turned around, shot her as she was bending over in pain. You don’t have to believe that.

The prosecutor added that, although there was “plenty of evidence to believe” Miller had been the shooter, the jury had to find him guilty of first-degree murder as an accomplice if it believed “he did anything to help in any way someone else kill her . . . .” Consequently, the record makes clear that the state’s theory of the case, as the prosecutor repeatedly argued,

was that Miller either was the shooter or Howard's accomplice. It was not impermissibly inconsistent then for the state to subsequently assert at Howard's trial that he was the shooter.

¶11 Miller also failed to establish that the trial court abused its discretion when it rejected his claims of ineffective assistance of trial counsel. To state a colorable claim for post-conviction relief based on counsel's alleged ineffective assistance, the defendant must establish counsel's performance fell below prevailing professional norms and that this deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the case would have been different. *See State v. Lee*, 142 Ariz. 210, 213, 689 P.2d 153, 156 (1984). Those of defense counsel's actions that appear to be trial tactics or the result of strategic decisions will not support a claim of ineffective assistance of counsel. *See State v. Espinosa-Gamez*, 139 Ariz. 415, 421, 678 P.2d 1379, 1385 (1984). Questions regarding the admissibility of evidence are left to the trial judge to decide in the exercise of his or her sound discretion. *See State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007) (trial court's admission of other-act evidence reviewed for abuse of discretion).

¶12 Miller asserts trial counsel should have objected when the state introduced evidence that he had been "hunting persons who assaulted Dan Gutierrez in order to seek revenge" and that Miller "was controlling and possessive with his girlfriend." Miller asserts that there was no basis under Rule 404(b), Ariz. R. Evid., for introducing this evidence and that counsel's substandard performance in failing to object resulted in "extreme prejudice"



because he was depicted as a violent, controlling individual who was particularly violent toward women.

¶13 The trial court rejected this claim, finding the evidence that Miller had been “in possession of a loaded [gun] the night of the murder would never have been precluded.” With respect to the evidence about Miller’s controlling personality, the court found “no evidence that the failure to object was not sound trial strategy or that the admission of the evidence prejudiced the Petitioner.” Miller has not persuaded us that, if defense counsel had filed a motion to preclude this evidence or had otherwise objected, the court would have been required to grant the motion or sustain the objections. The evidence that Miller had possessed a gun that night related to the very incident that gave rise to the charge. And the fact that he had the gun because he and Howard had been looking for persons who had assaulted Gutierrez was not impermissible evidence of a prior act, in violation of Rule 404(b). Rather, the evidence completed the story by explaining why they had guns and would thus have been admissible. *See State v. Johnson*, 116 Ariz. 399, 400, 569 P.2d 829, 830 (1977) (“complete story” exception to Rule 404(b) applies when other act is “so connected with the crime of which the defendant is accused that proof of one incident[a]ly involves the other or explains the circumstances of the crime”).

¶14 But, even if the court might have excluded the evidence that Miller was driving around with a gun and looking for persons who had assaulted Gutierrez, admission of this evidence was harmless in light of the other, properly admitted evidence about the murder, including Miller’s statements to various individuals about what had taken place. Therefore,

in its discretion, the trial court properly could have concluded that counsel's performance, if deficient, was not sufficiently prejudicial to warrant relief.

¶15 Nor has Miller persuaded us that he raised a colorable claim with respect to the introduction of evidence that Miller was a controlling boyfriend. We fail to see how this evidence even qualifies as prior-act evidence. *See generally* Ariz. R. Evid. 404(b). But again, even if the evidence was inadmissible, Miller failed to establish that, but for counsel's purportedly deficient failure to request its exclusion, the outcome of the case likely would have been different. *See Lee*, 142 Ariz. at 213, 689 P.2d at 156. There was ample evidence that Miller had either shot the victim himself or had acted as Howard's accomplice and that the two committed the murder for a variety of reasons, including a desire to rob the victim or silence her. No prejudice was established from any alleged deficiency of trial counsel.<sup>2</sup>

¶16 The petition for review is granted but, for the reasons stated, we deny relief.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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J. WILLIAM BRAMMER, JR., Judge

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<sup>2</sup>Nor do we find any merit to his arguments regarding comity, res judicata, and lack of jurisdiction.